

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Telecommunications Services)
Inside Wiring)
)
Customer Premises Equipment)
)
)
In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992:)
)
Cable Home Wiring)

CS Docket No. 95-184

MM Docket No. 92-260

To: The Commission

**COMMENTS OF MEDIA ACCESS PROJECT AND
CONSUMER FEDERATION OF AMERICA**

Media Access Project and Consumer Federation of America ("MAP/CFA") respectfully submit these Comments in response to the Commission's *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 97-376, at ¶¶258-71 (released October 17, 1997) ("*Second FNOPR*") in the above referenced dockets. The *Second FNOPR* requests comment on a number of proposals regarding, *inter alia*, exclusive contracts between owners of multiple dwelling units ("MDUs") and multichannel video programming distributors ("MVPDs"). *Second FNOPR* at ¶259.

MAP/CFA urge the Commission to proceed under a single, simple premise: any rules it adopts to govern exclusive contracts should provide the benefits of competition for *all* Americans.

To fulfill this goal, the Commission must permit viewers, including those living in MDUs,

to choose freely among MVPDs. Just as the Commission's broadcasting rules place primary emphasis on the rights of viewers,¹ so too should the Commission's broadband inside wiring policies be designed to afford maximum choice to viewers, bringing them the benefits of competition.

These goals are especially important in this proceeding because the Commission's new rules for inside wiring, adopted in the *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 97-376 (released October 17, 1997) ("*R&O*"), threaten to prevent, rather than promote, competition. As MAP/CFA and others have argued, the *R&O* vests the power to choose among MVPDs exclusively in the hands of MDU *owners*, such as apartment building landlords and condominium associations, instead of with *viewers*, where it belongs. See *Petition For Reconsideration of MAP/CFA*, filed December 15, 1997, in this docket ("*MAP/CFA Petition*"); *Petition for Reconsideration of Time Warner*, filed December 15, 1997 in this docket at 9-12.

Should the Commission decline to provide the relief that MAP/CFA and others have requested in their Petitions, it must, at the very least, ensure that MDU owners do not face resistance or roadblocks in making their choice. Therefore, it should prohibit exclusive contracts, or in the alternative, it should both limit their duration and carefully restrict their use.

I. TO PROMOTE COMPETITION AND CHOICE, THE COMMISSION SHOULD PROHIBIT EXCLUSIVE CONTRACTS OR, IN THE ALTERNATIVE, SHOULD NARROWLY LIMIT THEIR USE.

The *Second FNOPR* is grounded on an erroneous premise. The very first sentence

¹"It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

announces the Commission's belief that "exclusive service contracts between MDU owners and MVPDs can be pro-competitive or anti-competitive depending on the circumstances involved." *Second FNOPR* at ¶258. Specifically, it observes that "[s]ome alternative providers have commented that in order to initiate service in an MDU, they must be able to use exclusive contracts to ensure their ability to recover investment costs." *Id.*² Therefore, it seeks comment on whether to adopt a "cap" on the length of exclusive contracts for all MVPDs "that would limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover its specific capital costs of providing service to that MDU...." *Second FNOPR* at ¶259.

The Commission has failed to ask the most important question: whether to permit exclusive contracts in the first place. MAP/CFA believe it should not.

A. The Commission Should Prohibit Exclusive Contracts Because They Impede Competition.

Exclusive contracts generally thwart competition. When an MDU owner is subject to an exclusive contract, he or she has no ability to choose among MVPDs, and therefore cannot protect the rights and interests of the subscribers.³ This is especially onerous because the incumbent MVPD frequently held monopoly power when it formed the contract, so that the MDU owner did not have an alternative. *R&O* at ¶38. As the Commission has noted, these agreements

²It enumerates some of these costs as "including, but not limited to, the installation of inside wiring, headend equipment, and other start-up costs." *Second FNOPR* at ¶259

³This should not be interpreted as an endorsement of the notion that MDU owners typically will act in the best interests of their tenants. As MAP/CFA noted in their comments, MDU owners frequently base their decisions among MVPDs on factors other than the needs of their tenants, and will not always be motivated by any competition they may face in the MDU market. *1997 MAP/CFA Comments* at 10.

are often unclear, may have been entered into by a previous owner, and may form the basis for litigation or other threats. *Id.* Today, especially after the entry of a few fledgling competitors, the incumbent may no longer be the preferred choice of the owner or, more importantly, the MDU dwellers. Exclusive contracts, however, "lock in" one provider, preventing MDU owners from switching.

Moreover, exclusive contracts often motivate MDU owners to make decisions based on factors other than their tenants' interests. As several parties have noted, many exclusive contracts include monetary awards to the MDU owner. *E.g.*, 1997 MAP/CFA Comments at 10; 1997 Comments of Cablevision Systems, Inc. at 17-18; 1997 Comments of US West, Inc. at 8-9. Thus, an MDU owner is more likely to base the choice of MVPDs on the compensation received, not on what is best or less costly for the tenants.

B. If The Commission Does Not Prohibit Exclusive Contracts, It Should Adopt Five Year Limits On Their Duration And Restrict Their Use To Cases Where They Are Truly Necessary.

If the Commission does allow exclusive contracts, it should narrowly limit their use. Specifically, it should adopt a "cap" on the duration of these contracts, and should restrict their use to non-incumbent MVPDs only. The Commission has received evidence from one party that, on average, it takes 3.4 years to recover the costs of the inside wiring. Letter of Henry Goldberg, Counsel for OpTel Inc., to FCC Chairman Reed E. Hundt, February 7, 1997 in CS Docket No. 95-184. The Commission must ensure that it has an adequate record in this proceeding, including reliable statistical evidence, to affirm this factual claim.

Moreover, even if 3.4 years is an accurate estimate of the time necessary to recover these costs, this does not justify exclusive contracts that last significantly longer. The Commission

should limit the duration of exclusive contracts to five years, *see 1997 MAP/CFA Comments* at 9-11, and should not allow renewals of these contracts to proceed on an exclusive basis. This proposal will give incoming alternative MDUs ample time to recover their entry costs, along with more than one and a half years to realize a return. But it will also give the MDU owner the earliest opportunity to switch. After the first five years, the "alternative" MVPD should have to make a return on its investment the same way as any competitive enterprise - not by exclusive contracts, but by offering quality service at competitive prices.

The Commission's recently adopted rules contain provisions that would allow the departing incumbent to choose either to remove the inside wiring, abandon it, or offer it for sale to the MDU owner or alternative provider. *R&O* at ¶¶41, 49. In the "abandon" or "sale" cases, the incoming alternative MVPD would face lower costs of entry.⁴ Relieved of the costs of installing home run and home wiring, it would only need either to install riser cable and attach to a lockbox on each floor, or to attach cable to a single lockbox in the basement or exterior of the building. *E.g.*, *MAP/CFA Comments* at 6; *Ameritech Comments* at 3-4; *Liberty Comments* at 2-3; *DirecTV Comments* at 8; *OpTel Comments* at 10-11.

Therefore, in cases where the MDU owner has purchased the inside wiring or the previous MVPD abandoned it, exclusive contracts should be limited to an even shorter duration. MAP/CFA encourage the Commission to perform a careful study of the costs incoming alternative providers would face in such situations, and in any event, to adopt no more than a three year

⁴In those "sale" cases where an alternative MVPD buys the inside wire, it may not face lower costs. This depends on whether the price of the sale is less than the cost the alternative MVPD would face to install new inside wiring. Because the alternative MVPD may not realize cost savings that are as great as when the wiring is abandoned or the MDU owner purchases it, the Commission may find it necessary to adjust the cap accordingly.

cap in such cases.

C. The Commission Should Allow MDU Owners To Terminate An Exclusive Contract In Exchange For Reimbursement Of Unrecovered Investment Costs.

The Commission has also proposed to allow MDU owners an opportunity to terminate an exclusive contract and retain the inside wiring, "in exchange for a payment to the provider compensating it for unrecovered investment costs." *Second FNOPR* at ¶260. MAP/CFA support this proposal. This will compensate the incumbent for any costs incurred in initiating service to the MDU, while providing the MDU owner with the freedom to switch between providers.

D. The Market Power Test For Exclusive Contracts Is Ill-conceived Because Unlawful "Market Power" Already Exists Where There Is An Exclusive Contract, And, In Any Event, Would Place An Enormous Burden On MDU Owners.

The Commission's proposal to use a "market power" alternative to caps on the duration of exclusive contracts is especially ill-conceived. This unwieldy plan undermines First Amendment values and the very policies upon which it is purportedly based.

The proposed alternative is to "limit exclusive contracts" to circumstances "where the MVPD...possesses market power." This proposal, the Commission says, would resolve anticompetitive concerns, because exclusivity unreasonably restrains trade "only" when a "significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J. concurring) citing *Standard Oil v. United States*, 337 U.S. 293 (1949). In the Commission's view, MDU owners are the "buyers," and MVPDs are the "sellers."

The Commission's emphasis on MDU owners as "buyers" is inconsistent not only with the First Amendment, *see* discussion at 2 above, but also with the policy enunciated in *Jefferson*

Parish. In that case, the Court reviewed an exclusive contract between a hospital and a small group of anesthesiologists. But in making its determination whether that contract was illegal, the Court looked to the *patients*, and not the hospital, as the entities "buying" the anesthesiologists' services. As the Court stated, the critical question in the case was "whether this arrangement involves the use of market power to force *patients* to buy services they would not otherwise purchase." *Id.* at 26 (emphasis added).

The Commission should similarly look here to MDU residents, the viewers, as the relevant buyers. Under the standards laid out both in the majority and concurring opinions in *Jefferson Parish*, it is apparent that whenever an incumbent MVPD has an exclusive contract, it has the market power to prevent MDU dwellers from making choices they might otherwise make in a competitive environment. Where exclusive contracts exist, incumbent MVPDs can illegally "force a purchaser [an MDU resident] to do something that he would not do in a competitive market," *id.* at 13-14 - that is, choose an alternative MVPD that better suits his needs. Similarly, under the standard set out in Justice O'Connor's concurrence, where exclusive contracts exist, both alternative MVPDs as "sellers" and all MDU residents as "buyers" are "frozen out of" the MVPD market. *Id.* at 45 (O'Connor, J. concurring).

Moreover, it will be administratively burdensome for the Commission to determine, on an *ad hoc* basis for every MDU in the nation, whether the incumbent MVPD has "market power." In addition, the Commission's proposal would place an enormous and unfair burden on the MDU owner or alternative provider to determine whether the incumbent MVPD has "market power." Indeed, this rule would tend to make exclusive contracts the rule rather than the exception. Given this burden of proof, to the extent that they would not favor an exclusive

contract, MDU owners would likely be dissuaded from taking any action at all.⁵

II. THE COMMISSION'S DECISION NOT TO PREEMPT STATE MANDATORY ACCESS STATUTES WILL ENSURE LIMITED, IF ANY, MVPD COMPETITION IN THOSE STATES.

The Commission asks whether its "decision not to preempt state mandatory access statutes," *R&O* at ¶¶41, 49, has the effect "that non-cable MVPDs cannot enforce exclusive agreements in those states, even where such exclusive contracts may be pro-competitive." *Second FNOPR* at ¶262.

The simple answer to the Commission's question is "of course." In a mandatory access state, the access rights of cable MVPDs will prevent any non-cable MVPD from having an "exclusive" contract. Moreover, because, as the Commission itself notes, most MDU owners are reluctant to allow a second set of inside wiring, *R&O* at ¶¶35, 36, non-cable MVPDs will be placed at a disadvantage in those states. Even if the non-cable MVPDs in those states can convince the MDU owner to allow them to provide service, they would have to install inside wiring without any guaranteed revenue to recover their entry costs.⁶

That non-cable MVPDs will be subject to these obstacles is an illustration of why the Commission erred in choosing not to preempt mandatory access statutes. *R&O* at ¶¶41, 49. As MAP/CFA and other parties have long urged, the preemption of these statutes is necessary to promote viewer choice and competitive parity. *E.g.*, *1997 MAP/CFA Comments* at 8; *1997 Consumer Electronics Manufacturers Association Comments* at 8-13.

⁵As MAP/CFA have said previously, MDU owners often prefer exclusive contracts because they are compensated handsomely in return. *1997 MAP/CFA Comments* at 10.

⁶However, as discussed above at 4, MAP/CFA are skeptical about whether exclusive contracts are truly necessary to recover such costs.

III. THE COMMISSION SHOULD PROHIBIT PERPETUAL EXCLUSIVE CONTRACTS, CLARIFY THAT THEY ARE SUBJECT TO ANY CAP THAT IT ADOPTS ON EXCLUSIVE CONTRACT DURATIONS, AND ADOPT A "FRESH LOOK" WINDOW TO ALLOW MDU OWNERS TO CHOOSE OTHER PROVIDERS.

The Commission asks whether it can and should take any actions "regarding so-called 'perpetual' exclusive contracts (*i.e.*, those running for the term of a cable franchise and any extensions thereof)." *Second FNOPR* at ¶263.

It is imperative that the Commission take such action. Perpetual contracts are the antithesis of competition; they would prevent MDU owners from *ever* having a choice. The Commission should clearly specify that such contracts would be subject to any "cap" it adopts on exclusive contract durations.

In addition, MAP supports the Commission's proposal to create a 180 day "fresh look" window for MDU owners to reconsider perpetual exclusive contracts. *Second FNOPR* at ¶265. This would give MDU owners who were subject to perpetual exclusive contracts the opportunity to opt out of them immediately, instead of waiting for the newly-created cap to expire. The window should open immediately upon the effective date of the rules for all applicable MDUs.

IV. THE COMMISSION SHOULD ADOPT THE PROPOSAL TO ESTABLISH VIRTUAL DEMARCATION POINTS IF THEY ARE TECHNOLOGICALLY ACHIEVABLE.

The Commission has asked questions about a suggestion by DirecTV that the Commission should establish a "virtual" demarcation point, "from which an alternative provider could share the wiring simultaneously with a cable operator." *Second FNOPR* at ¶270. It seeks comment on, *inter alia*, the technical, practical, and economic feasibility of this proposal.

MAP/CFA support this proposal, and urge the Commission to adopt rules establishing

such a virtual demarcation point if it is technologically possible. Virtual demarcation points could promote competition because MDU dwellers, and not their landlords, will be able to choose between two or more MVPDs simultaneously, or perhaps even receive service from both. Virtual demarcation points could also promote entry by alternative MVPDs, who would no longer need to face costly installation of new or redundant wiring.

CONCLUSION

The Commission should examine exclusive contracts through the lens of promoting viewer choice. Having placed MDU owners in a position to act as representatives of the viewers in their buildings, it must not allow exclusive contracts to limit owners' ability to make that choice, or at a minimum must limit the duration and use of such contracts.

Respectfully Submitted

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